Supreme Court, U.S.
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In The
Supreme Court of the United States

CLIFTON MALLERY A/K/A ENJAI OMAA EELE,
AMNAU KARAM EELE,
Petitioners,

v.

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB, BRYAN FULLER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Second Circuit affirmed the United States District Court for the Southern District of New York summary judgment without notice entered in favor of respondents in the case of Clifton Mallery a/k/a Enjai Omaa Eele and Amnau Karam Eele - Petitioners v. NBC Universal, Inc., NBC Universal Television Studio, Tailwind Productions, Tim Kring, Dennis Hammer, Allen Arkush, Jeph Loeb and Bryan Fuller – Respondents.

This case arises out of the claim of copyright infringement filed March 17, 2007 by the petitioners under the Copyright Act of 1976, 17 U.S.C. 101 et seq., action pursuant to 28 U.S.C. 1331 and 1338(a), judicial district pursuant to 28 U.S.C. 1391(b) and (c) against the respondents. The petitioners oppose the summary judgment without notice in this case because the United States Second Circuit Court of Appeals has entered a decision in conflict with the decision of the United States Ninth Circuit Court of Appeals (Twentieth Century Fox v. MCA, Inc., 715 F.2d 1327 (9th Cir. 1983)) and the United States Sixth Circuit Court of Appeals (Bridgeport Music, Inc., and Southfield Music, Inc. v. UMG Recordings, Inc., and Universal Music Investments, Inc., No. 07-5596 (6th Cir. Nov. 4, 2009)) on the same important matter.

The petitioners were not afforded full faith and credit of Federal Rules of Civil Procedure (Rule 26-37). The respondents have not provided exhibits proving originality of their intellectual property, no clearance domain which is needed by a network like NBC to obtain an Error & Omission Insurance policy which is needed by law to air a TV show like "Heroes" and

distribution of any Heroes products, toys etc ... The widespread infringement of copyrights permitted by the decision in this case undermines the entire system of copyrights protection, author originality which is required by copyright law, injures content distributors who respect the copyright laws and contradicts the "fair use" and Lanham Act. 15 U.S.C. 1125(a), Section 43(a); Taylor v. Carpenter, 23 F. Cas. 742, 744 (C.C.D. Mass. 1844); 15 U.S.C. 1114; Paul Heald, Federal Intellectual Property Law and the Economics of Preemption, 76 Iowa L. Rev. 959, 1002-03 (1991). The court should find respondents subject to severe liability for widespread violation of the copyright laws and should not be allowed to set a precedent with this case as a matter of law.

Three questions are presented:

1. Should the Lower District and Appeals Courts have the lawful right to set a precedent as a matter of law when the petitioners received no due diligence, no due process, no pre-trial conference, by contrast to mis-represention of first impressions and holdings?

2. If genuine issues of Material Fact exist will the moving party be entitled to prevail and granted a summary judgment without notice as a matter of law? Boone v. Mechanical Specialities Co., 609 F.2d 956, 959 (9th Cir. 1979) under rule 56(c); British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 No.6 (9th Cir. 1978), cert. denied, 440 U.S. 981, 99 S. Ct. 1790, 60 L. Ed. 2d 241 (1979); Fed. R. Civ. P. 56(c); First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253 (1968).

3. Is summary judgment without notice appropriate as a matter of law when the record is

replete with facts that should have been presented to a jury, the respondent Tim Kring does an admission of guilt in the media and an admission to access and copying the petitioners' copyrighted intellectual property by an NBC representative attending petitioners' show at Hunter College on April 22, 2005 as stated on page 13 of the oral argument held in the United States Court of Appeals for the Second Circuit on May 19, 2009?

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The Order of the United States Court of Appeals for the Second Circuit dated and decided June 3, 2009 appears at Appendix A, 1a.

The Opinion and Order of the United States District Court for the Southern District of New York dated and decided December 3, 2007 appears at Appendix F, 21a.

The Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing En Banc dated August 19, 2009 appears at Appendix G, 41a.

STATEMENT OF JURISDICTION

The District Court had federal question jurisdiction under the Copyright Act. 17 U.S.C. 501; 28 U.S.C. 1331, 1338(a). This Court has Appellate jurisdiction of the District Court's April 11, 2008 final order under 28 U.S.C. 1291 and petitioners' May 6, 2008 Notice of Appeal. And Denying Petition for Rehearing En Banc August 19, 2009, mandated September 2, 2009.

RELEVANT PROVISIONS INVOLVED

Fed. R. Civ. P. 56. Summary Judgment

* * *

(c) SERVING THE MOTION; PROCEEDINGS. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the

> hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.
>
> * * *

U.S. Const. art. IV, § 1:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

28 U.S.C. 1652 (State laws as rules of decisions):

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The Judgment in this case should not be rendered if the pleadings, the discovery and full disclosure of materials on file would have been viewed and analyzed in a side by side comparison etc. to show that there is genuine issue as to any material fact and that full faith and credit shall be given in regard to rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Petitioners Clifton Mallery a/k/a Enjai Omaa Eele and Amnau Karam Eele assert in this case (Mallery v. NBC) that the respondents NBC Universal, Tailwind Productions, Tim Kring etc. all have infringed the petitioners' "original, unique, pioneering, complex, fully developed" character expression and copyrighted intellectual property and their exclusive rights to create derivative works.

On April 22, 2005 the students of the art department at Hunter College NYC gave the petitioner Clifton Mallery a/k/a Enjai Omaa Eele the real life artist that can paint the future on large canvas before it happens an art exhibit and film screening based on his rare artistic abilities and the fictional character he and the petitioner Amnau Eele created: Idai Markus the New York City African American drug free artist that can paint the future on canvas before it happens and validate the predicted event with newspaper clippings. The petitioners' show at Hunter College were attended by several representatives from NBC including respondent Bryan Fuller. The NBC representatives took the petitioners' copyrighted IP that was available for the Hunter College students as a study guide and went back to Hollywood and created the character: Issac Mendez the New York City drug addicted Latino artist that can paint the future on canvas before it happens and validate the predicted event with newspaper clippings, which premiered on the TV show "Heroes" on September 26, 2006. The petitioners retained a lawyer to file a letter of complaint to NBC to politely inform NBC that NBC etc.al <http://etc.al/> were using the petitioners' character storylines, concepts and copyrighted

expressions from the petitioners' copyrighted IP titled: "The Twins – Journey of The Soul" copyrighted 2001 with short film excerpt titled: "The Letter" copyrighted 2004.

The petitioners retained the service of another attorney, John Coleman of Freidberg Cohen Coleman & Pinkas, LLP and a complaint was filed against the respondents March 17, 2007. After 2 months of the petitioners' lawyer's reluctance to request or submit documents to dispute false and deceitful claims by the respondents' attorney Marcia Paul, the petitioners retained the services of an additional law firm Gersten Savage, LLP to arrange a face to face meeting with respondents' attorney Marcia Paul of Davis Wright Tremaine, LLP.

On May 17, 2007 petitioners met respondents' attorney Marcia Paul at the law firm of Gerston Savage LLP. Proof of access, copying and similarities between the two works were presented by attorney Robert Wolf of Gersten Savage, LLP. The respondents' attorney Marcia Paul made a settlement offer of $750,000.00 plus 5% net royalty. Settlement offer was declined by the petitioners. Assessment of true value of infringement claim requested by petitioners.

Attorney Marcia Paul filed a motion to dismiss in the United States District Court for the Southern District of New York on June 15, 2007. There was no deposition from the respondents presented or requested by either counsel, no original notes or notes process to prove originality by the respondents, no clearance domain documents or Error & Omission insurance policy documents to confirm any rights of "fair use," no full disclosure or full discovery and the

full exhaustion of legal remedies afforded to the petitioners pre-trial.

By contrast, communication by e-mail and telephone conference between counsel for the petitioners John A. Coleman and counsel for the respondents Marcia Paul, communication between counsel for the respondents and Judge Cote's chambers and clerk that resulted in a limitation on petitioners' ability to present documents and exhibits in a comprehensive form to give merit to the infringement claim allowing the counsel for the respondents Marcia Paul to mis-represent the first impression and holdings of this case.

There was no pre-trial conference. Procedurally the district court should not have entered summary judgment pursuant to Rule 56 "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S. Ct 2505, 91 L. Ed. 2d 202 (1986). The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether there are any genuine factual issues that properly can be resolved only by finder of fact because they may reasonably be resolved in favor of either party.

Taking the facts most favorable to petitioners, Clifton Mallery a/k/a Enjai Omaa Eele is the only and first artist in New York City or the United States to make the claim of the artist who can paint the future on canvas before it happens, validate the predicted event with newspaper clippings and to have painted a catastrophe of two landmark buildings in New York before it happened. The character Idai Markus is the

first fictional character with this unique ability to paint the future created by the petitioners. Comparing Idai Markus with the infringed character Issac Mendez of "Heroes," there is no question that reasonable juries could find that the respondents infringed the storyline and expression of the character created by the petitioners. The petitioners reserve the exclusive rights to usage and protection of their intellectual property.

1. When comparing the first of many similarities, a photo of the original artist next to a painting on canvas of a catastrophe of two New York City landmark buildings in his studio and a drawing from "Heroes" pilot script of the infringed image of an artist next to a painting on wall of a catastrophe of two New York City landmark buildings in his studio appears at Appendix - H and I, 43a, 44a. Taking facts most favorable to the non-moving party there should be no question of genuine issues that there is the need for a trial. The petitioners are the original and the first to create the character who can paint the future. etc., published in 2001 One World Magazine - 2004 New York Daily News - 2005 The Envoy Hunter College NYC. The respondents admitted to producing the infringed work in Oct.-Nov. 2005, and used the artist that can paint the future and artwork in pilot script as a sale device to pitch "Heroes" to NBC network.

A summary judgment without notice by Judge Denise Cote was decided December 3, 2007. This summary judgment is in conflict with the Ninth Circuit Court decision, Twentieth Century Fox v. MCA, Inc. In both cases (Mallery v. NBC and Fox v. MCA, Inc.) the issue raised in the motion was whether defendants' production was so dissimilar to plaintiffs'

works, as to both ideas and expression of those ideas, that no material issue of fact existed on the question of substantial similarity, and the question could be decided as a matter of law. The trial court granted defendants' motion for summary judgment. In Fox v. MCA, Inc., Fox argued in its brief that a comparison of the two works discloses at least 34 similarities. In Mallery v. NBC, plaintiffs argued in its brief that a comparison of the two works discloses at least 23 similarities.

In June, 1978, Fox commenced this action against MCA, Universal, and ABC, alleging copyright infringement. Defendants moved for partial summary judgment on the copyright claims. In connection with that motion, the trial judge reviewed the Star Wars film and book, and a videotape of the first television episode of Battlestar. Defendants did not contest the validity of plaintiffs' Star Wars copyrights. Further, for purposes of the motion, defendants admitted access to plaintiffs' works. The law relating to a grant of summary judgment is clear. Only if no genuine issue of material fact exists will the moving party be entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-90, 88 S. Ct. 1575, 1592-93, 20 L. Ed. 2d 569 (1968).

On appeal, the question whether summary judgment was properly granted is one of law. Boone v. Mechanical Specialties Co., 609 F.2d 956, 959 (9th Cir. 1978). The standard governing our review is the same as that employed by the trial court under Rule 56(c). British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 n.6 (9th Cir. 1978). That is, the court must view the evidence and inferences therefrom in the light most

favorable to the non-moving party, herein plaintiffs-appellants Fox and Lucasfilm. Defendants-appellees MCA, Inc. may prevail only if no genuine issue of material fact exists on the question of substantial similarity of idea and idea expression.

After viewing the Star Wars and Battlestar motion pictures, the court concluded that the films do in fact raise genuine issues of material fact as to whether only the Star Wars idea or the expression of that idea was copied. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). At a minimum, it is a close enough question that it should be resolved by way of a trial. The court intimated no opinion whether the films are substantially similar as to either idea or expression, but stated only that reasonable minds could differ on those key factual issues. Thus, a grant of summary judgment was improvident.

The court did not imply that summary judgment is never appropriate in copyright infringement actions. Summary judgment is appropriate, where undisputed facts raise a complete defense as a matter of law. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 977 (2d Cir. 1980). A grant of summary judgment for plaintiff is proper where works are so overwhelmingly identical that the possibility of independent creation is precluded. See Peter Pan Fabrics, Inc. v. Dan River Mills, Inc., 295 F. Supp. 1366, 1369 (2d Cir. 1969). Similarly, summary judgment for defendant is appropriate where works are so dissimilar that a claim of infringement is without merit. See Rose v. Connely, 38 F. Supp. 54, 55-56 (S.D.N.Y. 1941) (two plays differed substantially in plot, character interest, general purpose, and intent). This, however, is not

such a case. The court therefore reversed and remanded this case for trial.

After the summary judgment by Judge Cote December 3, 2007, ten days later the respondents' attorney Marcia Paul made another settlement offer through attorney John Coleman, counsel for the petitioners. "If petitioners drop the lawsuit and don't file an appeal, the respondents' law firm Davis Wright Tremaine, LLP would waive the $100,000.00 legal fees against the petitioners. The petitioners declined the offer. E-mail from John Coleman to Marcia Paul appears at Appendix - L, 52a.

Petitioners' attorney John Coleman refused and made two errors to file a Notice of Appeal on behalf of the petitioners, the petitioners filed Notice of Appeal pro se. The petitioners retained a lawyer Michael Confusione to represent the petitioners on appeal. Mr. Confusione filed briefs on petitioners' behalf. Respondents' counsel responded. An oral argument was held on May 19, 2009. The Appellate Court affirmed the lower court's decision. The petitioners filed a petition for rehearing en banc pro se and entered evidence on record to affirm the merit of infringement by the respondents. The evidence was ignored by the Second Circuit Court and a Petition for Re-Hearing En Banc and an Emergency Injunction by the petitioners were denied. The petitioners feel that there is sufficient evidence for this case to be reversed and remanded for trial.

REASONS FOR GRANTING THE PETITION

Under Fed. Rule Civ. P. 56, summary judgment can only be granted when there is no genuine issue of material fact.

It is clear enough from recent cases that at the summary judgment stage the Judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As (citation omitted) indicate, there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Judge must ask, not whether the evidence unmistakenly favors one side or the other but whether a fair minded jury could return a verdict for the plaintiffs on the evidence presented.

Respondents do not dispute that the petitioners' copyrighted character Idai Markus is fully developed, original, unique, complex and copyrighted. (See Page 32 of 53 Brief of defendants-appellees, at Appendix M, 53a)).

Respondents do not dispute that several NBC representatives including the respondent Bryan Fuller attended petitioners' art exhibit and film screening at Hunter College April 22, 2005. (Oral Argument page # 13, at Appendix N, 54a).

Respondents do not dispute that respondents "accessed and copied" petitioners' copyrighted IP to create the respondents' character Issac Mendez and the TV show "Heroes." A comparison discloses the

petitioners' work and the respondents' work are the only two in the TV or Film Industry history to have the same storyline of an artist who can paint the future on canvas before it happens, validate the predicted event with newspaper clippings, that lives in New York City and painted a catastrophe of two NYC landmark buildings before it happened and attempted to stop that event with the help of other supporting character storylines and 23 additional fragmented similarities or paraphrases. This is a unique storyline exclusive to its originator, the petitioners. A terrorist attack that happen twice in the history of New York City is not a common event that is a recurring scene a faire.

Respondent Tim Kring did an admission of guilt in the media. Tim Kring admitted to "tampering with the parameter of the intellectual property to create content for NBC" and respondent Tim Kring admits to "borrowing" to build "Heroes" and how "Heroes" is not the most original idea in the world. A Originality which is required by the copyright law.

The respondent initially struck an affirmative defense of "Fair Use" raised in the motion to dismiss. By contrast in the case of Bridgeport Music, Inc. v. UMG Inc., the doctrine of fair use operates to present the mechanistic enforcement of copyright law in a way that would work to repress creativity. See Princeton Univ. Press v. Mich. Doc. Servs., Inc., 99 F.3d 1381 (6th Cir. 1996). It constitutes an affirmative defense that may be raised when there is substantial similarity between two works and evidence of copying. See Castle Rock Entm't, Inc. v. Carol Pub'g Group, Inc., 150 F.3d 132 (2d Cir. 1998) (quoting 3 Nimmer on Copyright 13.05[A]). Under the federal copyright statute, fair use covers purposes such as "criticism,

comment, news reporting, teaching..., scholarship or research." See Bridgeport Music, Inc. v. UMG, Inc.; 17 U.S.C. 107. In determining applicability of the doctrine of fair use, courts consider these statutory factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The Supreme Court has held that these statutory factors must be considered "in light of the purposes of copyright." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994). For instance the first factor – the "purpose and character of use" – takes into account whether the work is transformative, that is, whether it would further the purpose of copyright to advance scientific and artistic endeavor. See id. at 579.

The respondents' derivative work "Heroes" presented no "transformativeness" that made the derivative work transcend or place in a new light the underlying work of the petitioners on which "Heroes" is based.

Similarly, the second factor addresses whether the work at issue is within the "core" of copyright protection or more marginal, with "creative expression

for public dissemination" being within the "core of the copyright's protective purpose." Id. at 586.

The third factor calls for both a quantitative inquiry into how much original material was used and a qualitative one, regarding the material's importance in the original work. See id. at 586-87.

Applying the statutory factors from 17 U.S.C. 107, we conclude that the result reached by a jury would not be unreasonable. Although one of them perhaps weighs in favor of defendant, in balance it is clear that the greater weight favors plaintiff is certainly transformative (first factor), having a different theme, mood and tone from the original work. However, as an original work is clearly within the core of copyright protection (second factor). Moreover, although the scope of use by defendants consisted of relatively small elements of the original work, a jury may indicate that they were distinctive and recognizable elements (third factor). Finally, although defendants may argue that the market for "Heroes" was not the same as for the plaintiffs' work, the effect on the market of the copyrighted work also includes the market for derivative works.

The respondents' attorney Marcia Paul stated in court that the petitioners' character's unique storyline, of the artist who can paint the future and the other supporting character storylines and 23 additional fragmented similarities or paraphrases that respondent Tim Kring admitted to "borrowing" to build "Heroes," to "tampering with the parameter of intellectual property to create content for NBC" were just "mere ideas" and "scenes a faire" free for the taking.

This conflicts with the Sixth Circuit Court decision in the case of Bridgeport Music Inc. v. UMG Inc. A jury found UMG Recordings, Inc. and Universal Music Group, Inc. to have willfully infringed Bridgeport's rights in "Atomic Dog" and awarded statutory damages of $88,980. UMG appealed the verdict, claiming that the jury was improperly instructed and that UMG was entitled to judgment in its favor as a matter of law on the question of "substantial similarity." They found no reversible error and affirmed.

George Clinton created "Atomic Dog" in a recording studio in January 1982, working without a written score. Testimony at trial indicated that the song was composed spontaneously.

In 1998, Bridgeport became aware of "D.O.G. in Me" and contacted UMG's predecessors in interest, and later UMG itself, notifying them that elements of "Atomic Dog" were used in the recording without permission and requesting that the record label enter into a licensing agreement or cease distribution of the album and song. When no response was received this lawsuit followed.

As copyright owner, Bridgeport brought the action for copyright infringement against UMG. In turn, UMG filed a motion for summary judgment claiming that the allegedly infringing elements in "D.O.G. in Me," the use of the word "dog" in a low voice as "musical punctuation," the rhythmic panting, and the Bow Wow refrain "were not copyrightable as a matter of law." The district court denied UMG's motion, and the matter proceeded to trial. The jury rendered a verdict in Bridgeport's favor, finding UMG liable for

actual damages and statutory damages. The district court denied UMG's subsequent motion for a new trial and motion for judgment as a matter of law, and UMG appealed. Reduced to its essentials, the appeal challenges the propriety of the jury instructions in three respects; substantial similarity, fair use, and willfulness.

In this case (Mallery v. NBC), the respondent argued that the elements infringed were "mere ideas," "scenes a faire," "unprotected elements," not copyrightable as a matter of law, that are free for the taking. Those infringed elements were main storylines and at the core of the respondents' work. Those same elements were used to pitch and sale the pilot to the NBC network, resulting in "Heroes" being a number one hit TV Series. When those elements were removed from the respondents' work, the TV series fell off the ratings.

In Bridgeport Music Inc. v. UMG, Inc., the indispensable or standard aspects of a work, or those that follow directly from unprotectable ideas, should be filtered out as well. Once the unprotectable elements have been filtered out the two works can be compared to determine whether they are substantially similar, a question of fact. The question for the jury in substantial similarity cases is whether a lay observer would consider the works as whole substantially similar to one another. Murray Hill v. Twentieth Century Fox, 361 F.3d 312, 320 (2004); Williams v. Crichton, 84 F.3d 581, 590 (2d Cir. 1996).

However, as have several of our sister circuits, we have also noted that it is appropriate to modify this inquiry for situations in which a smaller fragment of

a work has been copied literally, but not the overall theme or concept, an approach referred to in the literature as "fragmented literal similarity." See 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright 13.03[A][2] (rev. ed. 2009); see also Bridgeport, Inc. v. Dimension Films, 410 F.3d 792, 797-98 (6th Cir. 2005); Positive Black Talk, Inc. v. Cash Money Records, Inc., 394 F.3d 357, 373 n.12 (5th Cir. 2004) (noting support for this approach in other circuits). In such situations, even a small degree of copying may support a finding of substantial similarity, depending on the context. See Murray Hill Publ'ns, Inc. v. ABC Commc'ns, Inc., 264 F.3d 622, 633 (6th Cir. 2001) (to constitute infringement a single line No. 7-5596 Bridgeport Music, Inc. v. UMG Inc., page 7 taken from a protected work would have to be "an integral part" of that work rather than "merely an incidental part of the background" and, by analogy as "readily recognizable" in terms of its relationship .... as "E.T. phone home" is to its movie source"). Thus, the copying of a relatively small but qualitatively important or crucial element can be an appropriate basis upon which to find substantial similarity. See Baxter v. MCA, Inc., 812 F.2d 421, 425 (9th Cir. 1987) (citing Hein v. Universal Pictures Co., 154 F.2d 480, 488 (2d Cir. 1946) for the proposition that a single brief phrase so idiosyncratic as to preclude coincidence might suffice to show copying.

Given that the two songs differed in theme, tempo, and style, UMG argued, no reasonable jury could have found substantial similarity. But, instead of instructing the jury to consider the works as a whole, the district court utilized the "fragmented literal similarity" standard. We conclude that in the circumstances of this case, there was no error.

The respondents in Mallery v. NBC admitted to using the artist that can paint the future and artwork in the pilot script as a sale device to pitch "Heroes" to NBC network. The petitioners' storyline of an artist who can paint the future on canvas before it happens, validate the predicted event with newspaper clippings, that lives in New York City and painted a catastrophe of two NYC landmark buildings before it happened and attempts to stop that event with the help of other supporting character storylines is unique and exclusive to its originator. There is no mere incident that the same main and important character storyline of the petitioners' work with 23 other fragmented similarities and paraphrases appear in the respondents' work "Heroes." The District Court and U.S. Court of Appeal erred to affirm the respondents' argument that these expressions were random, few and isolated unprotectable scene a faire.

Before the petitioners filed a lawsuit against the respondents for copyright infringement, a third party market affiliate in contract with NBC through Link Share created a website at http://www.therealheroes.blogspot.com/2006/10/mission-5- <http://www.therealheroes.blogspot.com/2006/10/mission-5-> see–.connections.html to generate sales and viewership for "Heroes," "Heroes products and shop NBC" by using petitioners likeness from a New York Daily newspaper article written by writer LLoyd Grove without the petitioners, the NY Daily News's or LLoyd Grove's permission. New York Times Co. v. Tasini, 533 U.S. 483, 505 (2001). After being notified NBC and the respondents issued "no DMCA take down notices" to remove petitioners likeness from this website as NBC did with youtube.com <http://youtube.com/>. The website mission is to find people like the characters on

the respondents' TV show "Heroes" and to promote and sell "Heroes," Heroes Products, I-Tunes and shop NBC" to Heroes fans and NBC customers.

The petitioners state that Miriam-Webster Dictionary states that "an idea arises in a reflex, spontaneous manner, even without thinking or serious reflection."

The petitioner Clifton Mallery a/k/a Enjai Omaa Eele is a real living artist that can paint the future. His ancestors' tribe, The Luba, and his art work based on this rare and unique ability is part of the permanent collection of the MET Museum NYC and the New York Historical Society's Archives, the petitioners and their tribe The Luba have been studied and exhibited by UCLA professors and others for over 30 years. The only "mere idea" in this case is that the respondent Tim Kring got "the idea" to change the petitioners' copyrighted character Idai Markus into Issac Mendez, the respondent Tim Kring placed the character Issac Mendez in his script as a sales device and sold Issac Mendez to the respondent NBC as his own (Tim Kring's) original intellectual property, which it is not.

The respondent Tim Kring's actions were "Not a good idea" and it would be an "even worse idea" for the Supreme Court to allow such a devastating unlawful precedent to be set with a lawsuit that includes a respondent Tim Kring that admitted to not only "accessing and copying" another artist's (the petitioner – Clifton Mallery a/k/a Enjai Omaa Eele) intellectual property but respondent Tim Kring admitted in the media to lying, cheating, and "scheming" to get the stolen IP "Heroes" on the air.

The law says:

> Whoever, having devised or intending to devise any *scheme* or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing each scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000.00 or imprisoned not more than 30 years, or both.

18 U.S.C. 1343 (emphasis added).

Tim Kring stated:

> I lied and schemed and manipulated all the way through the idiocy that is the notes process when you do this, was able to push the production through relatively unscathed and in the form that it would work in. . . . That's how Heroes got on the air.
>
> It's NOT THE MOST ORIGINAL IDEA in the world, you build and BORROW. Just put these pieces together in the right way, at the right time, and on the right network.

http://blog.the-eg.com/2007/12/04/tim-kring/ (emphasis added).

> We are literally making up the parameters of the intellectual property that will take the networks into the next generation.

http://www.fastcompany.com/magazine/125/rebel-alliance.html (quoting Tim Kring). (See Appendix O, 56a).

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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